92-128

No. ——

Supreme Court, U.S.
FILED
JUL 20 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LESLIE N. BEDELL, an Individual and
BLUE WATER MARINE CATERING, INC.,
a Corporation,
Petitioners,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

H. H. HILLYER III
HAYWOOD H. HILLYER III
A Professional Law Corporation
P.O. Box 50476
New Orleans, LA 70150-0476
(504) 899-0890
(Counsel of Record)

PAUL E. MIRENGOFF
JAMES J. ROONEY
HUNTON & WILLIAMS
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 955-1500
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

45

QUESTIONS PRESENTED

1. The Fair Labor Standards Act contains an exclusion whereby the "sales" of an "establishment" that is considered a "mom and pop" establishment "shall not be included for the purposes of determining the annual gross volume of sales of any enterprise." Do the words used by Congress in creating this "mom and pop" exclusion require that the gross volume of sales made by a "mom and pop" establishment not count toward determining the annual gross volume of sales of an entire enterprise where the services to be performed pursuant to the sales contracts are performed at remote locations by persons not employed by the "mom and pop" establishement?

2. Does a cook aboard a seagoing vessel who works subject to the direction of the master of the vessel, who performs only the duties of a cook aboard the vessel, and who is therefore normally considered a seaman under the Fair Labor Standards Act, lose seaman's status if 20 percent or more of the persons who eat the cook's meals are not themselves seamen?

PARTIES TO THE PROCEEDINGS

The Petitioners are Leslie N. Bedell, an individual, and Blue Water Marine Catering, Inc.*

The Respondent is Lynn Martin, Secretary of Labor, United States Department of Labor.

*There are no parent companies or subsidiaries of Blue Water Marine Catering, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS AND REGULATIONS	2
STATEMENT OF THE CASE	4
A. Statement Of Facts	5
B. The District Court's Decision	6
C. The Court Of Appeals Decision	8
REASONS FOR GRANTING THE WRIT	10
I. THIS COURT SHOULD CORRECT THE COURT OF APPEALS' MISREADING OF THE "MOM AND POP" EXCLUSION, WHICH WOULD RESULT IN A SEVERE RESTRICTION OF THE PROTECTIONS OF THAT PROVISION	10
II. THIS COURT SHOULD CORRECT THE COURT OF APPEALS' ERROR IN NOT HOLDING THAT THE COOKS ARE EXEMPT AS "SEAMEN"	14
CONCLUSION	18
APPENDICES	1a

TABLE OF AUTHORITIES

Cases: Page

Donovan v. Nekton, Inc., 703 F.2d 1148 (9th Cir. 1983) 17
Louviere v. Standard Dredging Corp., 239 F.2d 164 (5th Cir. 1956) 17
Marcus v. Director, Office of Workers' Compensation Programs, 548 F.2d 1044 (D.C. Cir. 1976) .. 12
Marshall v. Woods Hole Oceanographic Industries, 458 F. Supp. 709 (D. Mass. 1978) 17
Walling v. W. D. Haden Co., 153 F.2d 196 (5th Cir.), *cert. denied*, 328 U.S. 866 (1946) 16

Statutes and Regulations:

29 U.S.C. § 203(s)(2) 2, 6, 11
29 U.S.C. § 207 ..... 2, 6
29 U.S.C. § 213(b)(6) 3, 8
Louisiana Civil Code Art. 2456 12
29 C.F.R. § 779.23 ..... 3, 7
29 C.F.R. § 783.31 ..... 3, 14, 15
29 C.F.R. § 783.32 ..... 4, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ———

LESLIE N. BEDELL, an Individual and
BLUE WATER MARINE CATERING, INC.,
a Corporation,
Petitioners,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Leslie N. Bedell and Blue Water Marine Catering, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 25, 1992, and as to which rehearing was denied on April 21, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this matter is reported at 955 F.2d 1029 (5th Cir. 1992) and is reprinted in Appendix A hereto, at p. 1a.

The Order denying Petitioners' Petition for Rehearing is not reported. It is reprinted in Appendix C hereto at p. 21a.

The Judgment and Findings and Conclusions of the United States District Court for the Eastern District of Louisiana are not reported. They are reprinted in Appendix B hereto at p. 13a.

JURISDICTION

1. On March 25, 1992, the United States Court of Appeals for the Fifth Circuit entered the judgment sought to be reviewed by this Petition.

2. On April 21, 1992, the United States Court of Appeals for the Fifth Circuit denied Petitioners' timely Petition for Rehearing.

3. This Court has jurisdiction to entertain this Petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS

This is an action under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* The action alleges a violation of the "maximum hours" provision of the FLSA, 29 U.S.C. § 207.

29 U.S.C. § 207(a)(1) provides:

> Except as otherwise provided in this section, no employer shall employ any of its employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 203(s)(2) provides:

> Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child

or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purposes of determining the annual gross volume of sales of any enterprise for the purposes of this subsection.

29 U.S.C. § 213(b)(6) provides:

The provisions of Section 207 of this title shall not apply with respect to any employee employed as a seaman.

29 C.F.R. § 779.23 provides:

As used in the Act, the term "establishment," which is not specially defined therein, refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled, and has been recognized in the Congress in the course of enactment of amendatory legislation (*Phillips v. Walling*, 324 U.S. 490; *Mitchell v. Bekins Van & Storage Co.*, 352 U.S. 1027, 95 Cong. Rec. 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong., 1st Sess., p. 25). As appears more fully elsewhere in this part, this is the meaning of the term as used in sections 3(r), 3(s), 6(d), 7(i), 13(a), 13(b), and 14 of the Act.

29 C.F.R. § 783.31 provides:

In accordance with the legislative history and authoritative decisions as discussed in §§ 783.28 and 783.29, an employee will ordinarily be regarded as "employed as a seaman" if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. This

> is true with respect to vessels navigating inland waters as well as ocean-going and coastal vessels. (*Sternberg Dredging Co. v. Walling*, 158 F.2d 678; *Walling v. Haden*, 153 F.2d 196, certiorari denied 328 U.S. 866; *Walling v. Great Lakes Dredge & Dock Co.*, 149 F.2d 9, certiorari denied 327 U.S. 722; *Douglas v. Dixie Land and Gravel Co.* (E.D. Tenn.), 9 WH Cases 285). The Act's provisions with respect to seamen apply only when he is "employed as" such (*Walling v. Haden*, supra); it appears also from the language of section 6(b)(2) and 13(a)(14) that they are not intended to apply to any employee who is not employed on a vessel.

29 C.F.R. § 783.32 provides:

> The term "seaman" includes members of the crews such as sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards if, as is the usual case, their service is of the type described in § 783.31. In some cases, it may not be of that type, in which event the special provisions relating to seamen will not be applicable (*Sternberg Dredging Co. v. Walling*, 158 F.2d 678; *Cuascut v. Standard Dredging Co.*, 94 F. Supp. 197; *Woods Lumber Co. v. Tobin*, 199 F.2d 455). However, an employee employed as a seaman does not lose his status as such simply because, as an incident to such employment, he performs some work not connected with operation of the vessel as a means of transportation, such as assisting in the loading or unloading of freight at the beginning or end of a voyage, if the amount of such work is not substantial.

STATEMENT OF THE CASE

This is an action by the Secretary of Labor alleging violations of the Fair Labor Standards Act (FLSA), upon which jurisdiction was based. The action was brought in the United States District Court for the Eastern District of Louisiana. The District Court entered judgment in favor of the Defendants-Petitioners. It held

that neither the employees in question as individuals nor the Petitioners as an enterprise was covered by the FLSA. It held that Petitioners as an enterprise were not covered because they were entitled to the FLSA's exemption for "mom and pop" businesses. The U.S. Court of Appeals for the Fifth Circuit reversed this ruling.

A. Statement Of Facts

Petitioner Blue Water Marine Catering, Inc. (Blue Water) was a Louisiana corporation. Petitioner Leslie N. Bedell was the sole owner, president, and manager of Blue Water. Bedell operated Blue Water from his home in Gretna, Louisiana. The only other people who worked with Bedell in the Gretna office were his wife and the daughter of his wife.

From the Gretna office, Bedell sold Blue Water's catering services to "jack-up boats." Jack-up boats provide offshore maintenance services (*e.g.*, welding, sandblasting, painting, and diving) for oil companies. Blue Water would supply cooks to work on the jack-up boats. Bedell was the only individual who sold Blue Water's catering services. All sales of Blue Water's services were made from the Gretna office and all payments for its services were received there.

The duties of the Blue Water cooks were limited to preparing meals, washing dishes, and related work performed strictly in the galley. They never performed any of the offshore maintenance work, such as welding, sandblasting, painting, or diving. The cooks were at all times subject to the authority, direction, and control of the captain of the vessel.

During the period of time relevant to this case, Blue Water paid the cooks whose services it supplied a day rate that was based, implicitly, on a recognition of overtime hours. It did not pay them at an hourly rate with overtime premiums. Blue Water's use of the day rate was consistent with the universal practice of the offshore

oil services industry dating back to the 1940's. The practice was based on the understanding, never questioned by the Labor Department for forty years, that the jack-up boat cooks were exempt from the FLSA as seamen, pursuant to 29 U.S.C. § 213(b). Moreover, the practice of paying the day rate operated to the economic benefit of the cooks in Blue Water's case. This became apparent when, in an attempt to avoid litigation, Blue Water abandoned the day rate. When the cooks worked less than seven straight days (which occurred frequently), they got paid less under the hourly-wage-plus-overtime practice than they would have received if paid a comparable day rate.

B. The District Court's Decision

After forty years of apparent acquiescence, the Secretary of Labor decided that the payment of the day rate violated the FLSA. It brought this action against Blue Water, a small business, in an effort to overturn the industry-wide practice. The District Court held a one-day bench trial on the issue of liability. The Court then entered judgment in favor of Blue Water. It held first that the cooks supplied by Blue Water, as individuals, were not covered by the FLSA because they did not produce goods for commerce within the meaning of 29 U.S.C. § 207. (*See* p. 16a, *infra*).

The District Court then held that Blue Water, as an enterprise, was exempt from coverage under 29 U.S.C. § 203(s), the "mom and pop" exclusion. (*See* p. 18a, *infra*). During the relevant time period,[1] this provision stated:

> Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of the owner shall not be considered to be an enterprise en-

[1] The 1989 amendments slightly changed the grammer and structure of the "mom and pop" provision, but made no substantive alteration.

> gaged in commerce or in the production of goods for commerce or a part of such an enterprise . . .

It further provided:

> the sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

The court found that the office of Blue Water in Bedell's home was an establishment of Blue Water Marine. It further found that the only regular employees of that establishment were Bedell, his wife, and his wife's daughter. The court found that the cooks whose services Blue Water sells to the jack-up boats are not employees of the Gretna office establishment. It noted that these cooks never set foot inside the Gretna office and are paid at locations remote therefrom. (*See* p. 17a, *infra*).

The court rejected the Labor Department's contention that the Gretna office should not be considered an establishment in its own right, but rather one component of a single establishment comprised of the Gretna office plus the off-shore vessels where the cooks work. The court noted that this argument was inconsistent with the Department's own Interpretative Bulletin, 29 C.F.R. § 779.23, which provides:

> As used in the Act, the term "establishment," which is not specially defined therein, refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business . . . . As appears more fully elsewhere in this part, this is the meaning of the term as used in sections 3(r), 3(s), 6(d), 7(i), 13(a), 13(b) and 14 of the Act.

(*See* p. 18a, *infra*). The court concluded that Blue Water's Gretna office was a distinct physical place of business and thus an establishment. It also concluded that the jack-up vessels where the cooks worked were separate establishments within Blue Water's enterprise. (*Id.*).

The court then found that the sales of Blue Water were sales of the Gretna office "mom and pop" establishment, since those sales were entirely generated from that establishment. The court concluded that under the "mom and pop" exclusion, 29 U.S.C. § 203(s), these sales could not be included for purposes of determining the annual gross volume of the Blue Water enterprise. Without those sales, the gross volume of Blue Water's sales did not meet the $250,000 threshold for FLSA enterprise coverage that applied during the relevant time period. Accordingly, the District Court held that Blue Water was exempt from FLSA coverage. (*See* p. 18a, *infra*).

Blue Water also argued in District Court that the cooks supplied by Blue Water were exempt from coverage as "seamen" under 29 U.S.C. § 213(b)(6). The court rejected this argument. It found that Blue Water's cooks perform work essential to the operation of the vessels on which they work. It also found that while aboard these vessels the cooks are subject to the authority, direction, and control of the master of the vessel. (*See* p. 18a, *infra*). The court held that one is employed as a seaman if one performs service which is rendered primarily as an aid in the operation of a vessel as a means of transportation. The court concluded, without giving its reasons, that the cooks in question "do not meet such requirements." (See p. 19a, *infra*).

C. The Court Of Appeals Decision

The Court of Appeals reversed the District Court's holding that Blue Water, as an enterprise, is exempt from coverage under the "mom and pop" exclusion.[2] It remanded the case so the District Court could redetermine, under the standard articulated by the Court of Appeals, whether the cooks were seamen for purposes of the FLSA.

---

[2] Because the FLSA's overtime provisions apply if the employees are covered as individuals *or* if the enterprise for which they work is covered, the Court of Appeals found it unnecessary to decide whether the cooks were individually covered.

The Appeals Court held that Blue Water is not exempt under the "mom and pop" exclusion because, in its view, the income generated by the work of the cooks should be attributed to the entire enterprise, not to the Gretna office establishment. It concluded, therefore, that this income counts toward the dollar volume requirements of the FLSA. Attributing this income to Blue Water as a whole meant that the Blue Water enterprise was covered by the FLSA. (*See* pp. 8a-9a, *infra*).

The Appeals Court did not disagree with the District Court's finding that the office in Bedell's Gretna home was a distinct establishment under the FLSA. Similarly, the Court did not overturn the District Court's finding that the Gretna office had no regular employees outside of immediate family members. In fact, the Appeals Court stated that "because [the cooks] could be employees of the Blue Water enterprise without being employees of the Bedell establishment, . . . we cannot say that they are employees of Blue Water's home office." (*See* p. 7a, *infra*). The court concluded however, that if the cooks are not employees of the Gretna office establishment, then the revenues their services help bring to Blue Marine may not be attributed to the Gretna office establishment, but instead must be attributed to the overall Blue Water enterprise. (*See* p. 9a, *infra*). It stated that otherwise it would be too easy for businesses controlled by immediate family members to fall within the "mom and pop" exclusion. (*See* p. 8a, *infra*).

As to the seaman exemption, the Appeals Court, deferring to Labor Department regulations, held that, for purposes of the FLSA, a seaman is an employee, including a cook, who

> performs as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of a vessel as a means of transportation.

(*See* p. 11a, *infra*). The court also agreed with the regulations that if a worker performs both seaman's work and

nonseaman's work, the worker is a seaman unless the nonseaman's work is substantial in amount, *i.e.*, more than 20 percent of the time worked. The court then determined that cooks render services as an aid in the operation of a vessel as a means of transportation only to the extent that they cook "for seamen." It remanded the case to the District Court for a determination of whether the cooks spend more than 20 percent of their time preparing food for individuals who are not involved in the navigation of the boat. (*See* p. 12a, *infra*).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CORRECT THE COURT OF APPEALS' MISREADING OF THE "MOM AND POP" EXCLUSION, WHICH WOULD RESULT IN A SEVERE RESTRICTION OF THE PROTECTIONS OF THAT PROVISION

By misreading the plain language of the "mom and pop" exclusion, the Fifth Circuit has severely restricted the important protection afforded by that provision. The "mom and pop" exclusion reflects the Congressional desire to insulate from federal intrusion, at least to a degree, the pay policies of a class of small, family-owned and operated businesses. The Fifth Circuit's ruling would limit that protection essentially to situations in which only the employees of an entire enterprise, not just of an establishment thereof, are "mom and pop" and their immediate relatives. The use of employees at completely distinct establishments to assist in producing revenue would be enough to defeat application of the exclusion.

The Fifth Circuit's ruling thus will have major consequences for small, family-owned and operated businesses. Standing alone, this fact would not necessarily merit this Court's attention. However, the Fifth Circuit's decision is based on a patent misreading of the plain language of the statute. Moreover, the Fifth Circuit appears to have misread the statute precisely in order to prevent the

"mom and pop" exclusion from encompassing more than a very few situations. This Court should intercede to prevent judicial policy-making that flouts the clear commands of Congress.

Applying the plain language of the "mom and pop" exclusion to District Court findings that were not overturned on appeal requires the conclusion that Blue Water is not covered by the FLSA. The "mom and pop" exclusion provides, in relevant part, that

> Any establishment that has as its only regular employees the owner thereof or the . . . spouse . . . or other members of the immediate family of such owner shall not be considered to be . . . a part of [an enterprise engaged in commerce]. The *sales* of such an establishment shall not be included for the purposes of determining the annual gross volume of *sales* of any enterprise for the purposes of this subsection.

29 U.S.C. § 203(s)(2) (emphasis added). The Court of Appeals did not overturn the District Court's findings that the Gretna office was an establishment whose only regular employees were the immediate family members of the owner. Similarly, it did not disturb the lower court's finding that all of Blue Water's sales are made from the Gretna office establishment. Accordingly, the plain language of the "mom and pop" exclusion dictates that the sales made by the Gretna office establishment (which constituted all sales of Blue Water) be excluded from the annual gross volume of the sales of the Blue Water enterprise. The Court of Appeals simply declined to follow the language set forth by Congress.

The Court of Appeals emphasized that the revenue (or income) Blue Water ultimately receives through the sales made by Bedell from the Gretna office is, in part, the result of services performed by the cooks at establishments other than the home office. At one point, it described the District Court's error as the attribution of "the *revenues* generated by [the cooks'] work in the

jack-up boats to [the] home office establishment." (*See* p. 8a, *infra*, emphasis added). Later, it stated that "the District Court erred by attributing the *income* earned by working on [the jack-up boat] establishments not to the Blue Water enterprise but to the one establishment in Gretna." (*See* p. 9a, *infra*, emphasis added).

In fact, however, the District Court made no findings or holdings about how to attribute "income" or "revenues" generated by the work of the cook. Instead, looking to the plain words of the statute, the District Court limited its findings and holdings to "sales." It found that all sales of Blue Water's services are generated and made from the Gretna office. It therefore held that the sales cannot be assigned elsewhere. The Court of Appeals erred by departing from the District Court's statutorily required focus on "sales" and injecting the concepts of "income" and "revenue" into a provision that does not contain those words.

As written, the "mom and pop" exclusion looks only to sales themselves, not to the goods or services that are the objects of the sales. To use the concept of the services generated by the cooks instead of the concept of the sales generated by Bedell (the only salesperson) is to violate the unambiguous statutory language. In common business practice, a sale occurs as soon as someone agrees to provide services for a certain price. The same is true under Louisiana law, which provides:

> The sale is considered to be perfect between the parties . . . as soon as there exists an agreement for the object and for the price thereof; although the object has not yet been delivered, nor the price paid.

Louisiana Civil Code Art. 2456.[3] Thus, the sales at issue in this case occurred when Bedell, from his office in Gretna,

[3] Congress has not, in the FLSA, specified the time at which a sale is considered to be perfected. Thus, the Court should look to local law to supply this missing element. *Cf. Marcus v. Director, Office of Workers' Compensation Programs*, 548 F.2d 1044, 1047 (D.C. Cir. 1976).

agreed to provide the services of cooks. Under the plain language of the "mom and pop" exclusion, those events were sales of the Gretna office establishment and could not be included for purposes of determining the annual gross sales volume of Blue Water.

The Appeals Court indicated that its attribution to the entire Blue Water enterprise of sales generated by the Gretna office was the necessary consequence of concluding that the cooks were not Gretna office employees. It believed that if the cooks work at establishments other than the Gretna office, then "the income generated by work performed at [Blue Water's] many other establishments should be attributed to the entire enterprise." (*See* p. 8a, *infra*). However, nothing in the language of the statute sunggests that there is any linkage between the questions of (1) which non-sales persons are employees of an establishment and (2) what constitutes a sale of the establishment. These are separate and distinct inquiries. It was error for the Appeals Court to have permitted its determination of the former issue to influence its determination of the latter one.

Ultimately, the Court of Appeals based its decision unabashedly on its conviction that it would be poor policy to permit the exclusion from FLSA coverage of sales made by "mom and pop" establishments where the services sold by those establishments are performed at other non-"mom and pop" establishments of the same enterprise. But this policy preference by the court does not justify judicial rewriting of the statute. If Congress had shared the court's preference, it would have described that which is excluded by the "mom and pop" provisions as "goods and services produced," or as "money generated by work performed;" it would not have used the word "sales." Absent such language, the Court of Appeals should not have found FLSA coverage in this case.

II. THIS COURT SHOULD CORRECT THE COURT OF APPEALS' ERROR IN NOT HOLDING THAT THE COOKS ARE EXEMPT AS "SEAMEN"

Blue Water's policy of paying its cooks a day rate was consistent with a forty year industry-wide practice. As a practical matter, notwithstanding the remand, the Fifth Circuit's decision will enable the Labor Department to overturn that practice. The entire off-shore oil services industry will be affected. Indeed, it is likely that the Fifth Circuit's approach will affect the entire maritime industry, including ocean liners, cruise ships, and freighters that carry passengers to improve their profitability. All of these vessels ordinarily have cooks aboard, most of whom do more than 20 percent of their cooking for regular passengers.

The Fifth Circuit's ruling is without statutory, regulatory, or logical basis. For this reason, and in light of its consequences for the industry, the Fifth Circuit's rejection of the longstanding industry-wide practice deserves this Court's review.

The District Court found that Blue Water's cooks perform work essential to the operation of seagoing vessels traveling between Louisiana and the Outer Continental Shelf. It also found that while aboard these vessels "the cooks are subject to the authority, direction, and control of the master of the vessel." (*See*, p. 18a, *infra*). The Court of Appeals did not disagree with either finding. Under the Labor Department's own regulations, these findings should have resulted in a ruling that the cooks are seamen for purposes of the FLSA.

The FLSA does not define "seaman" for purposes of the Act. Labor Department regulations provide:

> . . . [A]n employee will ordinarily be regarded as "employed as a seaman" if he performs, . . . subject to the authority, direction and control of the master aboard a vessel, service which is rendered primarily

> as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character.

29 C.F.R. § 783.31. The regulations (at 29 C.F.R. § 783.32) go on to state that "the term 'seaman' includes . . . cooks . . . if as is the usual case their service is of the type described in § 783.31."

Accordingly, under the Labor Department regulations, cooks are seamen if (1) they are subject to the authority, direction and control of the master aboard a vessel and (2) they perform service primarily as an aid in the operation of the vessel as a means of transportation, and no substantial amount of work of a different character. As noted, there is no question that the cooks at issue here meet the first requirement. Nor is there any doubt that the cooks perform service as an essential aid in the operation of the vessels as a means of transportation. The Court of Appeals, however, concluded that in order for the cooks' services to be *primarily* in aid of the operation of vessels as a means of transportation (and not, in substantial amount, of a different character) they must cook predominantly "for seamen." (*See* p. 12a, *infra*).

There is no statutory, regulatory, or logical basis for grafting this additional requirement onto the definition of "seaman." A vessel cannot operate as a "means of transportation" if the individuals being transported are not fed. This is true whether the individuals in question are other seamen, ordinary pasengers, or off-shore oil field maintenance workers. Thus, application of the seaman exemption to cooks should not turn on which categories of persons eat the food the cooks prepare. Rather, as the Court of Appeals stated (*see* p. 10a, *infra*) and the Labor Department regulations imply, the analysis should depend upon the "actual work performed." Indeed, the entire FLSA is "pervaded by the idea that what each employee actually does determines its application to him." *Walling*

v. W. D. Haden Co., 153 F.2d 196, 199 (5th Cir.), *cert. denied*, 328 U.S. 866 (1946). The actual work performed by Blue Water's cooks is the same regardless of who eats the meals.[4]

By focusing on the actual work performed, one can sensibly apply 29 C.F.R. § 783.31 and 32 without the need to count heads at meal time. Cooks who, "as in the usual case," primarily prepare basic meals providing sustenance for the people being transported are "seamen." Cooks who primarily provide specialized, non-essential culinary services, or who double as (for example) oil field maintenance workers, are not. The undisturbed findings of the District Court establish that Blue Water's cooks perform essential food services. Thus, the Court of Appeals erred in not finding them exempt.

The Court of Appeals ruling should be rejected on equitable grounds, as well. For forty years, the crews of offshore vessels, including the cooks, have been considered to be seamen by their employers and have been paid at day rates without formal overtime premiums. The Labor Department never challenged this practice, nor did it issue any regulation or interpretation that put the industry on notice that the status of the cooks depended on who consumed their meals.

Indeed, in past suits involving analogous situations, the Labor Department has not tried to recover overtime pay for cooks, but instead has sought overtime only for on-board staff that has used the vessel and its services

---

[4] The Court of Appeals' approach, which defines cooks as seamen to the extent they cook for seamen, is flawed logically because it defines "seamen" by reference to the very term being defined. Thus, to perform the head count contemplated by the Appeals Court, one would have to ask whether other crew members are performing their services primarily for seamen. This exercise would, in turn, require determining whether the cooks themselves count as seamen, which is the very question under consideration. In short, the Court of Appeals' definition is circular.

in order to perform work wholly irrelevant to transportation. For example, *Marshall v. Woods Hole Oceanographic Industries*, 458 F.Supp. 709 (D. Mass. 1978), involved oceanographic research vessels whose only function was to sail to offshore locations and perform scientific research. The vessels were specifically designed for this purpose and had "no other practical functions or capabilities." 458 F.Supp. at 711. Labor sued to recover overtime pay for the scientific staff on the vessels, but not for the employees engaged in the operation of the vessels. Among the groups not included in the list of employees for whom overtime was sought was the cook. *Id.* at 715. The court's opinion does not suggest that the cook's status as a seaman depended on the extent to which his meals were consumed by the scientists. *See also Donovan v. Nekton, Inc.*, 703 F.2d 1148 (9th Cir. 1983) (Labor Department suit was limited to seeking overtime for marine technicians and electronic technicians abroad oceanographic, seismological, and geographic research vessels). In both cases, it appears that the scientific, nonseaman staff comprised more than 20 percent of the persons aboard ship.

The Fifth Circuit itself, in determining seaman status, has previously looked only to the type of work performed by crew members, not the identity of the individuals who benefittted from the work. In *Louviere v. Standard Dredging Corp.*, 239 F.2d 164 (5th Cir. 1956), the issue was whether the deckhand on a tug was a seaman. The deckhand did only the normal work of a deckhand on a vessel, just as the Blue Water cooks do only the normal work of cooks aboard ship. However, all of the tug's work—and thus all of the deckhand's work—went towards servicing the needs of a dredge which was engaged in "industrial" work rather than transportation. The court noted that the work of the dredge crew was not exempt seaman work. Yet, even though the deckhand's work was directed to meeting the needs of nonexempt industrial workers, the court held that he was a

seaman under the FLSA, since he himself did only deck-hand work, not industrial work. Under this logic, the Blue Water cooks are seamen, even if they primarily meet the needs of non-seaman, since they themselves do only crew-member work.

Fundamental fairness should prevent the infliction of significant damages on a small business through a novel and illogical construction of the seaman exemption. Blue Water simply followed a forty year, universal industry pay practice. Nothing in the Labor Department regulations, its past litigation posture, or the decisions of the courts suggested that this pay practice was unlawful. Accordingly, the Court should correct the Court of Appeals' error in interpreting the seaman exemption.

CONCLUSION

For the foregoing reasons, Petitioner requests that this petition for certiorari be granted.

Respectfully submitted,

H. H. HILLYER III
HAYWOOD H. HILLYER III
A Professional Law Corporation
P.O. Box 50476
New Orleans, LA 70150-0476
(504) 899-0890
(Counsel of Record)

PAUL E. MIRENGOFF
JAMES J. ROONEY
HUNTON & WILLIAMS
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 955-1500
Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-3706

LYNN MARTIN, Secretary of Labor,
Plaintiff-Appellant,

v.

LESLIE N. BEDELL and
BLUE WATER MARINE, CATERING, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

March 25, 1992

Wendy B. Bader, Willian J. Stone, Paula W. Coleman, Counsel, Appellate Lit., U.S. Dept. of Labor, Washington, D.C., Robert P. Davis, Sol. of Labor, U.S. Dept. of Labor, Dallas, Tex., for plaintiff-appellant.

Haywood H. Hillyer, III, Milling, Benson, Woodward, Hillyer, Pierson & Miller, New Orleans, La., for defendants-appellees.

Before WISDOM, HIGGINBOTHAM, and SMITH, Circuit Judges.

WISDOM, Circuit Judge:

This case presents the question whether the cooks employed by the defendant appellee, a caterer to boats providing offshore support to oil companies in the Gulf of

Mexico, are entitled to overtime pay under the Fair Labor Standards Act (FLSA). Because the income generated by those cooks must be attributed to their employer, the employer is bound to comply with the Act's overtime provisions. Because the district court's factual findings are insufficient to support its determination that the cooks do not fit within the narrow definition of "seaman" under the FLSA, we remand for further, limited factual findings. We therefore REVERSE the decision below as to the employer's exemption from enterprise coverage, and REMAND as to the cook's status as non-seaman, so that the district court may make necessary findings as to the work the cooks perform.

I. BACKGROUND

Blue Water Marine Catering, Inc. ("Blue Water") supplies cooks for "jack-up boats". Those boats provide offshore maintenance services for oil companies. Both parties concede that the oil and gas produced by those companies enter the stream of interstate commerce.

For the dates pertinent to this appeal, Blue Water paid its cooks a day rate. The Department of Labor, through its Wage and Hour Division, investigated Blue Water and determined that this form of payment violated the FLSA. The Secretary of the Department of Labor, Elizabeth Dole (now Lynn Martin), brought this suit to force Blue Water and its president, Leslie N. Bedell, to comply with the overtime provisions of the FLSA. Accordingly, we shall refer to the plaintiff/appellant as "Labor".

The district court held a one-day bench trial limited to Blue Water's liability. The court decided that neither the cooks as individuals nor Blue Water as an enterprise was covered by the FLSA. As to the cooks, it held that their work outside of Louisiana's territorial waters was outside the jurisdiction of the FLSA. When the cooks did work within those waters, the court held that the food they cooked (food that was consumed aboard) was not "goods

for commerce"; therefore, their services were not closely related to or directly essential to the production of goods for commerce, and were not covered by the Act. The court also held that Blue Water itself was excused from compliance because it fitted within the Act's exception for business establishments employing only immediate members of one family. Finally, the court held that the cooks, although they worked on seagoing vessels, did not fit within the FLSA's narrowly construed exemption of seamen. Labor appeals all but this last holding, which Blue Water challenges.

II. THE STATUTORY FRAMEWORK

The FLSA guarantees overtime pay to employees engaged "in the production of goods for commerce" ("individual coverage") *or* "employed in an enterprise engaged in commerce or in the production of goods for commerce" ("enterprise coverage").[1] *Either* individual *or* enterprise coverage is enough to invoke FLSA protection.[2]

Many exceptions temper the strictness of this rule. Relevant to the issue of enterprise coverage in this case is the "mom and pop" exception. The FLSA defines "enterprise engaged in commerce or in the production of goods for commerce" to exclude "any establishment which has as its only regular employees" members of one immediate

---

[1] 29 U.S.C. § 207(a)(1) reads:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[2] Our finding that Blue Water is subject to enterprise coverage therefore values it unnecessary to consider the district court's decision on individual coverage.

family.[3] The sales of such an establishment are not included in determining the minimum amount of revenues that triggers the Act's application.[4] Labor's interpretive bulletins define an "establishment" to be a "distinct physical place of business".[5] The only employees who work at the home office establishment of Blue Water are Mr. Bedell, his wife, and her daughter. Without other "regular employees" their office in Gretna, Louisiana would be excluded from the Act as a "mom and pop" establishment.

There are also relevant exemptions from individual coverage. For example, an employer need not comply with the Act's overtime requirements if its employees are exempt under 29 U.S.C. § 213(b). One of those exemptions, § 213(b)(6), is for "any employee employed as a seaman".

III. ENTERPRISE COVERAGE AND THE "MOM AND POP" EXCLUSION

Applying the words "employer", "establishment", and "enterprise" under the FLSA can be confusing. Labor's own interpretations bravely attempt to define them.[6] In

---

[3] 29 U.S.C. § 203(s)(2) provides:

> Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purposes of determining the annual gross volume of sales of any enterprise for the purposes of this subsection.

[4] *Id.*

[5] 29 C.F.R. § 779.23 (1990).

[6] 29 C.F.R. § 779.203 (1990) provides:

> The coverage, exemption and other provisions of the Act depend, in part, on the scope of the terms "employer," "establishment," or "enterprise." As explained more fully in Part 776 of this chapter, these terms are not synonymous. The term

general, "employer" is usually a person; "establishment" is a place of business; and "enterprise" is the business itself, a number of related activities done for a common business purpose.

For the times relevant to this case, no enterprise was subject to the FLSA unless its annual gross sales volume exceeded $250,000.[7] As we noted above, the Act excludes sales figures for a "mom and pop" establishment that regularly employs only immediate family members. The district court found that Blue Water's home office in Gretna, Louisiana was such an establishment: its sales figures, all generated from that establishment, would not count toward a finding of enterprise coverage. The court found that the jack-up boats on which the cooks are employed are separate establishments under the Act, but that the sales volume generated by the cooks' work in those establishments were attributable to Blue Water's home office. For that reason, those sales (which the court found to be greater than $250,000) do not count toward enterprise coverage. In so ruling, the court weaved two errors

---

"employer" has been defined in the Act since its inception and has a well established meaning. As defined in section 3(d), it includes, with certain stated exceptions, any person acting directly or indirectly in the interest of an employer in relation to an employee. (See § 779.19.) The term "establishment" means a "distinct physical place of business" rather than "an entire business or enterprise." (See § 779.23) The term "enterprise" was not used in the Act prior to the 1961 amendments, but the careful definition and the legislative history of the 1961 and 1966 amendments provide guidance as to its meaning and application. As defined in the Act, the term "enterprise" is roughly descriptive of a business rather than of an establishment or of an employer although on occasion the three may coincide. The enterprise may consist of a single establishment (see § 779.204(a)) which may be operated by one or more employers; or it may be composed of a number of establishments which may be operated by one or more employers (see § 779.204(b)).

[7] 29 U.S.C.A. § 203(s)(1) (1978). In 1989 that figure was raised to $500,000. 29 U.S.C.A. § 203(s)(1)(A)(ii) (Supp.1991).

together. Unravelling them reveals two separate holdings by which the district court might have found, and by which we find as a matter of law, that Blue Water is subject to enterprise coverage under the FLSA.

The court erred first in the legal finding that, "while the cooks and galley hands are employees of Blue Water's enterprise, they are not employees of the Heritage Avenue [Bedell home office] establishment". The court found that "[n]one of the other regular employees of Blue Water ever set foot inside this establishment"; "the only regular employees of that establishment" are the three Bedell family members. It is not necessary, however, for cooks or for others ever to set foot in Blue Water's Gretna establishment to be its employees. It was error to deny that they *might* be employees of Blue Water's Gretna establishment.

The district court assumed that no one could be a "regular employee" of an establishment at which he never appears. Although the Act itself offers little guidance on this issue, we disagree. The question whether someone is the regular employee of an establishment is not answered, or not answered solely, by looking to whether he works *at* the establishment.[8] It is answered according to economic

---

[8] Labor's interpretive bulletins state that employees of an exempt retail or service establishment can also be exempt even if they do not work *at* the establishment. 29 C.F.R. § 779.307 reads in pertinent part that

> such employees as collectors, repair and service men, outside salesmen, merchandise buyers, consumer survey and promotion workers, and delivery men actually employed by an exempt retail or service establishment are exempt from the minimum wage and overtime provisions of the Act although they may perform the work of the establishment away from the premises.

The bulletins also state that employees of a non-exempt establishment cannot become exempt simply by visiting exempt establishments on behalf of their employers. 29 C.F.R. § 779.310 provides that

> traveling auditors, manufacturers' demonstrators, display-window arrangers, sales instructors, etc., who are not "employed

reality, applied through factors with which this and other courts have attempted a legal definition of "employee".[9] Blue Water has never contended that its cooks are actually the employees of any other employer. Because they could be employees of the Blue Water enterprise without being employees of the Bedell establishment, however, we cannot say that they are employees of Blue Water's home office.[10]

---

by" an exempt establishment in which they work will not be exempt merely because they happen to be working in such an exempt establishment, whether or not they work for the same employer. *Mitchell v. Kroger Co.*, 248 F.2d 935 (8th Cir.1957).

The mere location of employment is therefore not conclusive. A court should look to the economic reality, and not the location, of employment to determine who employs an employee.

[9] *See, e.g., Watson v. Graves*, 909 F.2d 1549, 1553 (5th Cir.1990) (citations omitted):

> For purposes of FLSA, determination of employee status focuses on economic reality and economic dependence. The "economic reality" test includes inquiries into:
>
> > whether the alleged employer (1) has the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

[10] Based on the facts before us, we find it unlikely that the technical, and for obvious reasons necessary, control exerted over Blue Water's cooks by the masters of the jack-up boats would be sufficient to destroy the economic reality of their employment by Blue Water. Yet even if it were the case that the cooks are employed by the jack-up boat owners as well as by Blue Water, we note that under the FLSA an individual can be employed by one employer or by more than one joint employer. *Falk v. Brennan*, 414 U.S. 190, 195, 94 S.Ct. 427, 431, 38 L.Ed.2d 406 (1973); *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 194 (5th Cir.1983); *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir.), *cert. denied*, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973). 29 C.F.R. § 791.2 (1991) provides:

> (a) A single individual may stand in the relation of an employee to two or more employers at the same time under the

The Blue Water *enterprise*, however, is not exempt from FLSA coverage merely because the Bedell home office might be a statutory "mom and pop" establishment. The trial court's second error was its unsupported holding that, because the cooks are not employed at Blue Water's one establishment, then the revenues generated by their work in the jack-up boats must be attributed to that home office establishment. The court found, inconsistently, that Blue Water's *only* establishment is its home office, yet it also found that the cooks are employed at each jack-up boat. We find that if the cooks are not employed at the Bedell home office establishment, then the jack-up boats must constitute distinct establishments in the Blue Water enterprise.

It would be inconsistent with the remedial purposes of the FLSA to attribute the income generated by the work of the cooks on jack-up boats to the Bedell home and not to those establishments and the larger Blue Water enterprise. Otherwise, any business controlled by immediate family members could exclude its employees from FLSA coverage by segregating them, even though their labors were the employer's only source of income, from the home office. We read the "mom and pop" exclusion to exclude from coverage only "Mom", "Pop", their immediate relatives, and the revenues *their* work generates. An enterprise that otherwise meets the prerequisites of FLSA coverage (i.e., has gross annual sales greater than the statutory minimum) cannot avoid that coverage by em-

---

Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. . . . [I]f the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act.

ploying only immediate family members at its home base, when a large pool of non-family employees generate the bulk of its income. In declaring that Blue Water's cooks worked at as many establishments as there are jack-up boats, the district court then erred by attributing the income earned by working on those establishments not to the Blue Water enterprise but to the one establishment in Gretna.

The appellee cannot have it both ways. Either Blue Water has one establishment that regularly employs a large number of unrelated employees, or it is an enterprise with many establishments; one of those establishments is exempt, but the income generated by work performed at its many other establishments should be attributed to the entire enterprise, and therefore count toward the dollar volume requirements of the FLSA. It is irrelevant which of these scenarios is true. Because the factual resolution of these issues would have no effect on the outcome, and because it is established that the revenues generated by the cooks' work are greater than the statutory minimum for enterprise coverage, we hold that Blue Water is subject to enterprise coverage as a matter of law.

IV. THE SEAMAN EXEMPTION

This Court has long been accustomed to a very broad definition of the word "seaman" for purposes of the Jones Act. This case reminds us, however, that the definition of seaman under the Jones Act is limited to that Act and its remedial goals.[11] In contrast, the remedial goals of the Fair Labor Standards Act lead us to read narrowly its exemptions, including the definition of "seaman".[12] A "seaman" is removed entirely from the Act's overtime pro-

[11] This Court has already decided that a seaman under the Jones Act is not a seaman under the FLSA. *Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518 (5th Cir.1989).

[12] *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960).

visions. An employer has the burden of proving that its employees stand outside of this Act's very broad protection.[13]

Because employment solely on seagoing vessels does not necessarily make one a "seaman" under the FLSA, a court must look to the actual work performed. Our review of a district court's investigation of this question is limited to its findings of fact, which we accept unless they are clearly erroneous.[14] We review *de novo* the application of those facts to the law.[15]

In this case the district court found that Blue Water's cooks perform work essential to the operation of seagoing vessels traveling between Louisiana and the outer Continental Shelf. It also found that, "[w]hile aboard the vessel, the cooks are subject to the authority, direction, and control of the master of the vessel". Yet from these facts the district court found that the cooks are *not* seaman because their services are not "rendered primarily as an aid in the operation of a vessel as a means of transportation".[16]

This Court has decided two cases involving the "seaman" exemption.[17] Although neither case offers us much help here, our more recent case directs us to the interpretive bulletins of the Wage and Hour Division of the Department of Labor, which, in turn, rely heavily on our earlier case; those bulletins also provide an answer in this

---

[13] *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 206, 86 S.Ct. 737, 747, 15 L.Ed.2d 694 (1966).

[14] *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739 (1986).

[15] *Id.*

[16] Quoting 29 C.F.R. § 783.31; *Petroleum Treaters*, 876 F.2d at 521.

[17] *Petroleum Treaters*, 876 F.2d 518; *Walling v. W.D. Haden Co.*, 153 F.2d 196 (5th Cir.), *cert. denied*, 328 U.S. 866, 66 S.Ct. 1373, 90 L.Ed. 1636 (1946).

case. We give great weight to the consistent interpretations of those bulletins.[18] They allow the holding that in some cases a seagoing cook may not be a seaman.

The regulations state that a "seaman" is an employee who, "performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of [a] vessel as a means of transportation".[19] They also state that "[w]hether an employee is 'employed as a seaman', within the meaning of the Act, depends upon the character of the work he actually performs and not on what it is called or the place where it is performed".[20] When a worker performs both seaman's work and nonseaman's work, he is a seaman unless his nonseaman's work is substantial in amount.[21] Labor defines "substantial" as work that "occupies more than 20 percent of the time worked by the employee during the workweek".[22]

The regulations also provide:

> The term "seaman" includes members of the crew such as sailors, engineers, radio operators, foremen, pursers, surgeons, *cooks*, and stewards if, *as is the usual case*, their service is of the type described in § 783.31. In some cases it may not be of that type,

---

[18] *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 297, 105 S.Ct. 1953, 1959, 85 L.Ed.2d 278 (1985); *Petroleum Treaters*, 876 F.2d at 521-22) ("The fact that the interpretation has not varied since the FLSA's enactment also entitles it to 'great respect'. *Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. 395, 95 S.Ct. 1066, 43 L.Ed.2d 279 (1975).")

[19] 29 C.F.R. § 783.31 (1991), citing (among other cases) *Walling v. W.D. Haden Co.*

[20] 29 C.F.R. § 783.33 (1991), again citing *W.D. Haden Co.*

[21] 29 C.F.R. § 783.37 (1991).

[22] *Id.*

> in which even the special provisions relating to seaman will not be applicable.[23]

A cook is *usually* a seaman because he usually cooks *for* seamen. In this case that commonplace may well be untrue. It would appear that Blue Water's cooks primarily feed workers who are not involved in the navigation of the boat on which they live and from which they work.[24] Even though the district court was correct to look to whether the cooks' services do in fact aid the operation of vessels as means of transportation, it did not state its findings in terms sufficient to satisfy the standards of Labor's interpretive bulletins, to which we defer. We remand so that the district court may determine if the cooks spend more than 20% of their time preparing food for non-crew members. If they do, they are not seamen under the FLSA.

V. CONCLUSION

For the reasons stated above, we REVERSE in part, and REMAND to the district court for the limited factual findings made necessary by this opinion.

---

[23] 29 C.F.R. § 783.32 (1990) (emphasis added).

[24] For example, in *W.D. Haden*, 153 F.2d at 199, we emphasized that the Act does not exempt seaman, but those "employed as seaman", a distinction we found more than tautological. We found that shell miners employed on a sea-going vessel "are employed more in industry than in shipwork". In this case, similarly, it seems likely that Blue Water's cooks are employed more in feeding industrial workers than in feeding ship workers. If more than 20% of their time is spent in the former, then they are intended beneficiaries of the FLSA. As we wrote in *W.D. Haden*, "[t]he entire Act is pervaded by the idea that what each employee actually does determines its application to him". *Id.*

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-1527

SECTION "E"

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor

versus

LESLIE N. BEDELL, an Individual and
BLUE WATER MARINE CATERING, INC., a Corporation

FINDINGS AND CONCLUSIONS

[Filed Aug. 9, 1990]

This is an action brought by the Secretary of Labor, United States Department of Labor, to enjoin defendants from violating provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and to restrain the withholding of payment of overtime compensation which may be found by the court to be due employees under the Act, together with interest thereon at the rate provided by 26 U.S.C. § 6621 from the date any backwages became due until judgment is entered and at the rate provided by 28 U.S.C. § 1961 thereafter until paid and for costs of this action. Jurisdiction under the Act is uncontested.

These material facts are uncontested by the parties:

1. Defendant Blue Water Marine Catering, Inc. has been since prior to April 7, 1987, a corporation with a

place of business and doing business in Gretna, Louisiana.

2. Defendant Leslie N. Bedell resides in Gretna, Louisiana, where he has been since prior to April 7, 1987 the president of and has managed defendant Blue Water.

3. Those persons listed on defendant Blue Water's payroll records (Plaintiff's exhibit 1), were employees of defendant Blue Water within the meaning of the Act for the periods of time indicated thereon.

4. During the period since April 7, 1987, defendant Leslie N. Bedell acted directly or indirectly in the interest of defendant Blue Water in relation to its employees.

5. During the period since April 7, 1987, defendant Blue Water has been engaged in related activities performed through unified operation and common control for a common business purpose.

6. For all relevant time periods, defendant Blue Water employs employees, at least two of whom handle food and food pruducts, substantial quantities of which had been produced outside the State of Louisiana and were transported into the State of Louisiana prior to being handled by said employees.

7. For all relevant time periods, defendant Blue Water's employees who are employed as cooks prepare such food and food products for consumption by employees of its customers.

8. For all relevant time periods, defendant Blue Water's customers are service companies engaged in various activities in the oil fields offshore from Louisiana, such as diving, sandblasting, and painting old platforms, welding, and "snubbing"; these services are rendered to oil companies who produce oil and gas offshore from Louisiana, which oil and gas is stipulated by the parties to be subsequently transported into Louisiana, among other states, and part of which in raw or processed form is then trans-

ported outside the State of Louisiana or other state of original destination.

9. For all relevant time periods, defendant Blue Water has had an annual gross volume of sales made or business done of not less than $250,000.00, exclusive of excise taxes at the retail level which are separately stated.

Disputed material facts include:

1. Whether during the period since April 7, 1987, defendants have had employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

2. Whether during the period since April 7, 1987, defendants' employees engaged in catering to personnel on offshore oil rights have been engaged in commerce or in the production of goods for commerce within the meaning of the Act.

3. Whether, during the period from April 7, 1987 to present, defendants' employees have worked hours in excess of 40 in any workweeks; and, if so, whether during the weeks during which hours in excess of 40 were worked the employees were compensated at a rate of not less than one and one-half times their regular hourly rate for all hours in excess of 40.

The principal issues presented are:

1. Whether defendants' employees are covered by the Act because they are engaged in the production of goods for commerce.

2. Whether defendants' employees are covered by the Act because they are employed in an enterprise engaged in commerce.

3. Whether defendants' employees are exempt from the overtime provisions of the Act because they are seamen.

Production of Goods for Commerce

It would require a stretch of the imagination for the Court to consider that, with the evidence presented, the defendants' employees produced goods for commerce as contemplated by 29 U.S.C. § 207. The cooks' duties consist of cooking meals to be eaten by themselves and by the other persons in the crew of jack-up rig vessels. The food is prepared strictly for immediate, local consumption aboard the vessels; the meals are not put into the stream of commerce from offshore back into any state. The "goods" produced by the cooks are meals. The preparation of meals by the cooks in most instances does not constitute "production" within the meaning of the Act. This is the case when the meals are prepared offshore, outside of the territorial limits of Louisiana and of any other states. 29 U.S.C. § 202(j), defines "produced" as, in part, meaning ". . . handled, or in any other manner worked on *in any State*; . . ." (emphasis supplied). When, as is most often the case, the cooking is done outside of state boundaries, there is no "production" of the meals, but even where the jack-up rigs are located in Louisiana's territorial waters, and there is "production", this "production" is not "for commerce".

To be production "for commerce", the meals must be produced for subsequent movement ". . . among the several States or between any State and any place outside thereof." Inasmuch as the meals will be consumed immediately on the premises, i.e., on the jack-up rigs, they are not produced for subsequent movement in commerce.

Since the cooks are not engaged in services closely related to or directly essential to production of goods for commerce, they are not individually covered under the Act. *McLeod v. Threlkeld, Et Al*, 319 U.S. 491, 493, 63 S.Ct. 1248, 1250 (1943).

Enterprise Engaged in Commerce

Plaintiff contends that Blue Water is an enterprise engaged in commerce as that term is defined in 29 U.S.C. § 203(s). Defendants contend to the contrary and rely, *inter alia* on the "mom and pop" exclusion to enterprise coverage set forth in that section, as follows:

> Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

Blue Water's operations fit this exclusion. Evidence showed that the only establishment of Blue Water is its office, located in defendant Bedell's home at 799 Heritage Avenue in Gretna, Louisiana. The only regular employees of that establishment are Bedell, his wife, Doris, and Doris' daughter, Mrs. Madeline Tourelle. None of the other regular employees of Blue Water ever set foot inside this establishment. Instead, they all report to remote locations, from which they leave for work at other "establishments", that is, on vessels offshore, and they are paid at locations remote from Blue Water's office. Therefore, while the cooks and galley hands are employees of Blue Water's enterprise, they are not employees of the Heritage Avenue establishment. All of the sales of Blue Water's catering service are made from, and all payments therefor are received at, Blue Water's office in Bedell's Heritage Avenue home.

Plaintiff's contention that Bedell's home should not be considered as an independent place of business, rather that it is but one component of a single establishment composed

of the home plus however many jack-up vessels owned by whichever customers who use Blue Water's cooks at any particular time does not comport with ordinary business usage. Plaintiff's contention flies in the face of its own "Interpretative Bulletin", 29 C.F.R. § 779.23, which says:

> As used in the Act, the term "establishment," which is not specially defined therein, refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business . . . . As appears more fully elsewhere in this part, this is the meaning of the term as used in sections 3(r), 3(s), 6(d), 7(i), 13(a), 13(b), and 14 of the Act.

Blue Water's office on Heritage Avenue is "a distinct physical place of business" and thus is an establishment; the jack-up vessels on which the cooks work are also separate establishments of Blue Water's enterprise, even though the vessels are not owned by Blue Water. Blue Water's sales were generated from its sales office. They cannot be considered as being assigned to customers' vessels. The "mom and pop" exclusion is here applicable.

Employees Exempt as Seamen

29 U.S.C. § 213(b)(6) exempts from coverage "any employee employed as a seaman" but does not define "seaman" for purposes of the Act. 29 C.F.R. § 783.32 does, however, refer to the term "seamen" as members of the crew, such as "cooks". Here the evidence showed that the cooks work on jack-up rigs, which are seagoing vessels. The vessels are documented by the Coast Guard. They are used for transportation from the shores of Louisiana to places outside of Louisiana, i.e., the outer continental shelf. The work of the cooks, feeding the rest of the crew, is just as essential to the operation of the vessel as is the work of any other person serving aboard the vessel. While aboard the vessel, the cooks are subject to the authority, direction, and control of the master of

the vessel. Though these cooks may well be "seamen" as that term is construed under the Jones Act, such is not necessarily so under the Fair Labor Standards Act. This issue was addressed in *Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518 (5th Cir. 1989) wherein the Court found the definitions of "seamen" in the aforesaid Acts to be separate and independent of each other. *Id.* at 520. The Court also determined, pursuant to 29 C.F.R. § 783.31 that one is "employed as a seaman" if he performs service which is rendered primarily as an aid in the operation of a vessel as a means of transportation. *Id.* at 521. In the matter *sub judice* the cooks do not meet such requirements and, accordingly, defendants' claim that its cook employees are exempt seamen fails.

New Orleans, Louisiana, this 9th day of August, 1990.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-1527

SECTION "E"

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor

versus

LESLIE N. BEDELL, an Individual and
BLUE WATER MARINE CATERING, INC., a Corporation

JUDGMENT

[Filed Aug. 9, 1990]

Considering the record, the law, evidence, memoranda, and argument of counsel, and for the reasons assigned,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of defendants, Leslie N. Bedell and Blue Water Marine Catering, Inc., and against plaintiff, Elizabeth Dole, Secretary of Labor, United States Department of Labor, dismissing plaintiff's suit, with costs.

New Orleans, Louisiana, this 9th day of August, 1990.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3706

LYNN MARTIN,
Secretary of Labor,
Plaintiff-Appellant,

versus

LESLIE N. BEDELL and
BLUE WATER MARINE CATERING, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(April 21, 1992)

Before WISDOM, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ John Minor Wisdom
United States Circuit Judge

Supreme Court, U.S.
FILED
SEP 21 1992
OFFICE OF THE CLERK

No. 92-128

In the Supreme Court of the United States

OCTOBER TERM, 1992

LESLIE N. BEDELL, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MARSHALL J. BREGER
Solicitor General
ALLEN H. FELDMAN
Associate Solicitor
JUDITH D. HEIMLICH
Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a catering business supplying cooks to boats that provide offshore maintenance services to oil companies is excluded from the requirements of the Fair Labor Standards Act (FLSA) as a "mom and pop" establishment simply because the business operates from a home office, and the only employees working at that office are the owner and his immediate relatives.

2. Whether cooks are seamen exempt from the overtime-pay requirements of the FLSA if more than 20 percent of their time is spent preparing meals for individuals who are non-seamen performing oil-well service work.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Anderson v. Manhattan Lighterage Corp., 148 F.2d 971 (2d Cir.), cert. denied, 326 U.S. 722 (1945)	13-14
Arnold v. Ben Kanowsky, Inc., 361 U.S. 388 (1960)	9
Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967)	7
Dole v. Petroleum Treaters, Inc., 886 F.2d 518 (5th Cir. 1989)	4, 12, 13
Donovan v. Brown Equip. & Serv. Tools, Inc., 666 F.2d 148 (5th Cir. 1982)	9
Donovan v. Nekton, Inc., 703 F.2d 1148 (9th Cir. 1983)	12, 14
Helena Glendale Ferry Co. v. Walling, 132 F.2d 616 (8th Cir. 1942)	14
Louviere v. Standard Dredging Corp., 239 F.2d 164 (5th Cir. 1956)	14
Marshall v. Woods Hole Oceanographic Inst., 458 F. Supp. 769 (D. Mass. 1978)	14
McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807 (1991)	13
Walling v. Bay State Dredging & Contracting Co., 149 F.2d 3246 (1st Cir.), cert. denied, 326 U.S. 760 (1945)	13
Wisniewski v. United States, 353 U.S. 901 (1957)	14
Worthington v. Icicle Seafoods, Inc., 796 F.2d 337 (9th Cir. 1986)	13

Statutes and regulations: Page

Act of May 5, 1961, Pub. L. No. 87-30, § 2(c), 75 Stat. 66.. 10
Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*:
29 U.S.C. 203(r) 2
29 U.S.C. 203(s)(1) 2
29 U.S.C. 203(s)(2) 2
29 U.S.C. 207(a)(1)(§ 7(a)(1)) 2, 6
29 U.S.C. 213(b)(6) 4, 11
Jones Act, 46 U.S.C. 688 13
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 13
29 C.F.R. (1991):
Section 779.23 ..... 2, 3
Section 779.203 2
Section 779.204(b) 2
Section 783.31 11
Section 783.32 ..... 4, 12
Section 783.33 12
Section 783.37 ..... 6, 12

Miscellaneous:

Staff of Senate Comm. on Education and Labor, 88th Cong., 1st Sess., *Legislative History of the Fair Labor Standards Amendments of 1961* (Comm. Print. 1963) 10
H. R. Rep. No. 75, 87th Cong., 1st Sess. (1961) 10
S. Rep. No. 145, 87th Cong., 1st Sess. (1961) 10
To Amend the Fair Labor Standards Act: Hearings on H.R. 3935 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 87th Cong., 1st Sess. (1961) 10

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-128

LESLIE N. BEDELL, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 955 F.2d 1029. The decision of the district court (Pet. App. 13a-19a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1992. A petition for rehearing was denied on April 21, 1992. The petition for a writ of certiorari was filed on July 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7(a)(1) of the Fair Labor Standards Act (FLSA or the Act), 29 U.S.C. 207(a)(1), requires statutory overtime rates to be paid to employees who are "employed in an enterprise engaged in commerce or in the production of goods for commerce." Under the Act, the term "[e]nterprise" means "related activities performed (either through unified operation or common control) by any person * * * for a common business purpose," 29 U.S.C. 203(r) (1988), and, at all times relevant to this proceeding, the phrase "[e]nterprise engaged in commerce or in the production of goods for commerce" meant an enterprise "whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated)." 29 U.S.C. 203(s)(1) (1988).

The FLSA contains a so-called "mom and pop" exclusion, which provides that "[a]ny establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner" will not be considered to be an enterprise subject to the requirements of the Act. 29 U.S.C. 203(s)(2) (1988). That provision further states that "the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection." *Ibid.* A long-standing interpretive bulletin issued by the Secretary of Labor defines an "establishment" as a "'distinct physical place of business' rather than * * * 'an entire business or enterprise' which may include several separate places of business." 29 C.F.R. 779.23. The Secretary's regulations also recognize that an enterprise may consist of a single establishment, or many different establishments. See 29 C.F.R. 779.203 and 779.204(b).

2. Petitioner Blue Water Marine Catering, Inc. (Blue Water) operates a catering business that supplies cooks to "jack-up boats" rendering maintenance services to oil fields off the coast of Louisiana. Pet. App. 2a, 14a. Petitioner Leslie N. Bedell is president of Blue Water. *Id.* at 2a. Bedell operates his business out of an office located in his home in Gretna, Louisiana. *Id.* at 5a, 17a. The only other employees of Blue Water physically located at the Gretna office are Bedell's wife and her daughter. *Id.* at 4a, 17a. All sales of Blue Water's catering services are initiated from the home office, and payment for services is received there. *Id.* at 5a, 17a.

In contrast to Bedell and his family, Blue Water's cooks and galley hands report to work at, and are paid at, remote locations, rather than the Gretna office. Pet. App. 17a. During the time period relevant to this case, Blue Water paid its cooks a "day rate" for their services on the jack-up boats. *Id.* at 2a.

Blue Water's cook-employees prepare meals on the jack-up boats for consumption by its customers' employees. Pet. App. 14a. It is undisputed that all of Blue Water's employees were part of a single enterprise within the meaning of the Act, and that during the relevant period, Blue Water had an annual gross volume of sales made or business done of at least $250,000. *Id.* at 15a.

3. Respondent brought suit against petitioners in the United States District Court for the Eastern District of Louisiana, claiming that petitioners violated the FLSA by failing to pay overtime wages to Blue Water's cooks. After a bench trial, the district court found that neither the cooks as individuals nor Blue Water as an enterprise was subject to the FLSA. Pet. App. 13a-19a.

The district court first held that the "mom and pop" exclusion applied to Blue Water. Pet. App. 17a-18a. Relying on the Secretary's interpretive bulletin defining the term "establishment," 29 C.F.R. 779.23, the court

concluded that the Gretna office was a separate establishment within the meaning of the Act. Pet. App. 18a. The court further found that, while petitioners' cooks and galley hands are employees of the Blue Water enterprise as a whole, they are not employees of the Gretna establishment because they never set foot inside the Gretna establishment and work and are paid at separate establishments (*i.e.*, the jack-up boats). *Id.* at 17a-18a. Thus, the "only regular employees" of the Gretna establishment were Bedell and his family. *Id.* at 17a. Since all of the sales of the Blue Water enterprise were generated from the Gretna establishment, and could not be attributed to the jack-up boats, the court concluded that the "mom and pop" exclusion was applicable. *Id.* at 18a.

The district court then rejected petitioners' contention that the cooks were exempt from the overtime provisions of the Act because they were seamen within the meaning of 29 U.S.C. 213(b)(6), which provides that overtime pay is not required for "any employee employed as a seaman." Pet. App. 18a-19a. The court observed that 29 C.F.R. 783.32 defines seamen as "members of the crew, such as 'cooks,'" and that the cooks' work of feeding the crew is "essential to the operation of the vessel." Pet. App. 18a. In addition, the court noted that the cooks are "subject to the authority, direction, and control of the master of the vessel" while on the jack-up rigs. *Id.* at 18a-19a. Nonetheless, the court concluded that petitioners' cook-employees were not employed as seamen within the meaning of the Act because they do not perform a "service which is rendered primarily as an aid in the operation of a vessel as a means of transportation." *Id.* at 19a (citing *Dole* v. *Petroleum Treaters, Inc.*, 876 F.2d 518, 521 (5th Cir. 1989)).

4. The court of appeals reversed in part and remanded in part. Pet. App. 1a-12a. Turning first to the question

whether petitioners qualified for the "mom and pop" exclusion, the court held that the district court erred in holding that the cooks were not employees of the Gretna establishment merely because they never set foot in that establishment. *Id.* at 6a-7a. The court reasoned that "[t]he question whether someone is the regular employee of an establishment * * * is answered according to economic reality, applied through factors with which this and other courts have attempted a legal definition of 'employee.'" *Id.* at 6a-7a. Under that test, the cooks "*might* be employees of Blue Water's Gretna establishment." *Id.* at 6a.

The court of appeals also concluded that, even if the Gretna office was excluded from the requirements of the Act by virtue of the "mom and pop" exception, that did not justify the district court's holding that the Blue Water enterprise as a whole was similarly excluded from the Act. Pet. App. 8a-9a. The court reasoned that "[i]t would be inconsistent with the remedial purposes of the FLSA to attribute the income generated by the work of the cooks on jack-up boats to the [Gretna establishment] and not to [the jack-up boat] establishments and the larger Blue Water enterprise." *Id.* at 8a. According to the court, the "mom and pop" exception, properly construed, excludes from the Act's coverage only "'Mom', 'Pop', their immediate relatives, and the revenues *their* work generates." *Ibid.* Thus, the court of appeals held that the district court erred in finding that the revenues generated by the cooks' work were attributable to the Gretna establishment even though the cooks were employed at separate establishments. *Id.* at 9a.

Accordingly, the court of appeals concluded that under any view of the facts, Blue Water had the requisite $250,000 in non-excluded revenues and thus was subject to the coverage of the Act. "Either Blue Water has one establishment that regularly employs a large number of

unrelated employees, or it is an enterprise with many establishments; one of those establishments is exempt, but the income generated by work performed at its many other establishments should be attributed to the entire enterprise, and therefore count toward the dollar volume requirements of the FLSA." Pet. App. 9a. Accordingly, the court of appeals reversed the district court's finding that Blue Water was not subject to the requirements of the FLSA.[1]

The court of appeals also disagreed with the district court's ruling on the question whether petitioners' cook-employees were "seamen" within the meaning of the FLSA, and accordingly remanded that issue for further consideration. Pet. App. 9a-12a. Noting that "employment solely on seagoing vessels does not necessarily make one a 'seaman' under the FLSA," the court looked to interpretive bulletins issued by the Secretary of Labor in determining whether petitioners' cook-employees constituted "seamen" under the Act. *Id.* at 10a-11a. Under those interpretive bulletins, an employee who "performs both seaman's work and non-seaman's work * * * is a seaman unless his nonseaman's work is substantial in amount," and work is "substantial" if it "occupies more than 20 percent of the time worked by the employee during the work-week." *Id.* at 11a (quoting 29 C.F.R. 783.37).

[1] The district court had also found that the cooks were not individually covered by the FLSA, because they were not engaged "in the production of goods for commerce" within the meaning of 29 U.S.C. 207(a)(1). Pet. App. 16a. The court of appeals found it unnecessary to address that issue, because the court's conclusion that Blue Water was subject to the FLSA as an "enterprise" was sufficient to extend the protections of the Act to Blue Water's cook-employees regardless of the district court's finding concerning the issue of individual coverage. *Id.* at 3a & n.2.

The court acknowledged that "[a] cook is *usually* a seaman because he usually cooks *for* seamen," but noted that in this case it appeared that Blue Water's cooks primarily fed workers who were not themselves seamen. Pet. App. 12a. Accordingly, the court remanded the case in order to permit the district court to determine whether "the cooks spend more than 20% of their time preparing food for non-crew members. If they do, they are not seamen under the FLSA." *Ibid.*

ARGUMENT

Petitioners seek review of an interlocutory judgment of the court of appeals. On remand to the district court, petitioners' cook-employees may be determined to be exempt from the requirements of the FLSA, thus obviating the need for petitioners to seek further review in any court. Accordingly, review should be denied, because petitioners offer no persuasive reason for the Court to depart from its usual practice of declining to review non-final orders of the courts of appeals. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

Moreover, the court of appeals did not clearly err in determining that Blue Water is subject to the requirements of the Act and that Blue Water's cooks are not exempt "seamen" unless they spend no more than 20 percent of their time preparing food for non-crew members. No other court has addressed those issues, and thus the court's decision does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. Petitioners first contend (Pet. 11) that the court of appeals erred in holding that Blue Water's operations are not excluded from the Act by virtue of the "mom and pop" exception. According to petitioners, that holding is inconsistent with the factual record, because the district

court found both that "the Gretna office was an establishment whose only regular employees were the immediate family members of the owner" and that "all of Blue Water's sales are made from the Gretna office establishment." Pet. 11. Petitioners assert that those findings were not overturned on appeal, and thus conclude that Blue Water must be deemed excluded from the requirements of the Act, because those findings indicate both that the Gretna establishment is a "mom and pop" establishment and that none of the sales attributable to the work of the cook-employees may be counted in determining whether Blue Water had the requisite $250,000 in revenues. *Ibid.*

a. Petitioners misapprehend the court of appeals' decision. The court of appeals expressly held that the district court committed legal error in finding that Blue Water's cook-employees were not employees of the Gretna establishment for purposes of the "mom and pop" exception, because the district court failed to look to "economic reality" in determining where those individuals were employed. Pet. App. 6a-7a. As the court of appeals stated, "[i]t was error to deny that [the cooks] *might* be employees of Blue Water's Gretna establishment." *Id.* at 6a.

The court of appeals thus plainly and appropriately discredited the district court's factual finding that only Bedell and his immediate family were employees at Blue Water's Gretna office. It was therefore not bound by that factual determination in reaching its legal conclusions.[2]

b. Petitioners also err in contending (Pet. 11-13) that the court of appeals improperly ignored the district

[2] As the court of appeals pointed out, moreover, there was no need for a remand on that issue to permit the district court to conduct factfinding under the proper legal standard, because Blue Water would be subject to the Act regardless of whether the cooks were employees of the Gretna office. Pet. App. 9a.

court's finding that all of Blue Water's "sales" were made out of the Gretna establishment. The court of appeals reasoned that, even if the Gretna establishment is a separate "mom and pop" establishment, the "revenue" or "income" earned from the work of Blue Water's cooks is not attributable to that establishment, but is instead attributable to other establishments of the Blue Water enterprise, namely, the jack-up boats themselves. Pet. App. 8a-9a. According to petitioners, that reasoning was erroneous, because under the "mom and pop" exception all "sales" of a "mom and pop" establishment must be excluded in determining whether the enterprise satisfies the $250,000 minimum, regardless of where the "revenue" or "income" reflecting those "sales" was actually earned.[3]

The court of appeals' interpretation of the FLSA is not clearly in error, and in the absence of a circuit conflict does not merit review. In the first place, it is well established that exceptions to the Act's requirements "are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); see *Donovan* v. *Brown Equip. & Serv. Tools, Inc.*, 666 F.2d 148, 153 (5th Cir. 1982).

In this case, the court of appeals concluded that crediting Blue Water's sales solely to the Gretna office rather than to the enterprise as a whole would defeat the Act's remedial purposes. Pet. App. 8a. Petitioners' contrary interpretation would permit "any business controlled by immediate family members [to] exclude its employees

[3] In this case, it appears that the total volume of sales, income, and revenues was identical. See Pet. 11 ("the sales made by the Gretna office establishment * * * constituted all sales of Blue Water").

from FLSA coverage by segregating them, even though their labors were the employer's only source of income, from the home office." *Ibid.* It is plain that a substantial loophole would be created if, for example, businesses such as construction companies or repair services, whose employees move from site to site, could evade the FLSA simply by making all their formal sales from an office operated only by family members.

Crediting these "sales" to the entire Blue Water enterprise is also consistent with the legislative history of the "mom and pop" exclusion, which was added to the Act in 1961. Act of May 5, 1961, Pub. L. No. 87-30, § 2(c), 75 Stat. 66. Congress repeatedly referenced small retail and "family-run stores" as the primary example of the kind of establishment that would come within the "mom and pop" exclusion. See, *e.g.*, Staff of Senate Comm. on Education and Labor, 88th Cong., 1st Sess., *Legislative History of the Fair Labor Standards Amendments of 1961*, 581 (Comm. Print 1963); S. Rep. No. 145, 87th Cong., 1st Sess. 45 (1961) ("the bill carefully avoids extending the act's coverage to so-called 'mom and pop' stores in which the only employees are the owner, or persons standing in the relationship of parent, spouse, or child of the owner"); see also *To Amend the Fair Labor Standards Act: Hearings on H.R. 3935 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 87th Cong., 1st Sess. 23 (1961) ("we are not covering the mom and pop and family stores") (statement of Arthur J. Goldberg, Secretary of Labor). As noted in the House Report, the intent of the sponsors of the 1961 amendments was "to exclude the small local retail merchants such as the corner grocer, neighborhood drugstore, barbershop, beauty parlor, and the like." H.R. Rep. No. 75, 87th Cong., 1st Sess. 9 (1961). While application of the "mom and pop" exclusion is by no means limited to those examples, it would appear that

in each of them all the "income" or "revenues" or "sales" of the business were a product of the work of the family employees. The court of appeals, therefore, properly viewed the "mom and pop" exclusion "to exclude from coverage only 'Mom', 'Pop,' their immediate relatives, and the revenues *their* work generates." Pet. App. 8a.[4]

2. Petitioners also contend (Pet. 14-18) that the court of appeals erred in holding that Blue Water's cooks are not "seamen" under the Act if they spend more than 20 percent of their time preparing food for non-seamen. The court of appeals' ruling on that issue is, however, correct.

The Act provides an exemption from overtime pay requirements for "any employee employed as a seaman." 29 U.S.C. 213(b)(6). The Secretary's interpretive regulations provide that an employee will "ordinarily" be considered a "seaman" if he is "subject to the authority, direction, and control of the master aboard a vessel" and his service "is rendered primarily as an aid in the operation of such vessel as a means of transportation, *provided he performs no substantial amount of work of a different character.*" 29 C.F.R. 783.31 (emphasis added). The regulations include "cooks" among those considered exempt seamen "if, as is the usual case, their service is of the type described in [29 C.F.R.] § 783.31," but provide

[4] Because the court of appeals' decision attributes to a "mom and pop" establishment all the revenues generated by the family members employed in that establishment, petitioner is wrong in contending that "[t]he use of employees at completely distinct establishments to assist in producing revenue would be enough to defeat application of the exclusion." Pet. 10. Here the court stated that it was "established that the revenues generated by the cooks' work are greater than the statutory minimum for enterprise coverage." Pet. App. 9a. While the basis for that factual conclusion is somewhat unclear, the correctness of the court's fact-bound allocation of "sales" or "income" among various establishments is not an issue that warrants this Court's review.

that seaman status is lost if the cooks perform work "not connected with operation of the vessel as a means of transportation," unless "the amount of such work is not substantial." 29 C.F.R. 783.32. The regulations define "substantial" non-seaman work as that which "occupies more than 20 percent of the time worked by the employee during the workweek." 29 C.F.R. 783.37. Finally, the regulations state the over-arching principle that a seaman's status "depends upon the character of the work he actually performs and not on what it is called or the place where it is performed." 29 C.F.R. 783.33. Petitioners do not challenge the validity of those interpretive regulations.

The Fifth Circuit has previously construed the Secretary's seaman regulations to require "an examination of the nature of the work actually performed by the employees and of the comparative amount of seamen versus non-seamen duties." *Dole* v. *Petroleum Treaters, Inc.*, 876 F.2d 518, 522 (1989). In that case, the court held that workers who spent at least half their time performing maintenance work on offshore oil wells—"a 'nonseamen' duty"—were not exempt seamen under the FLSA. *Id.* at 524. Other courts have applied a similar test in determining whether employees aboard a seagoing vessel are "seamen" exempt from the overtime protections of the FLSA. See, *e.g.*, *Donovan* v. *Nekton, Inc.*, 703 F.2d 1148, 1151-1152 (9th Cir. 1983) (marine technicians aboard an oceanographic research vessel are not exempt seamen because their primary duties are research).

The court here correctly applied the principles established in the Secretary's interpretive bulletins and case law. The principal duty of Blue Water's cooks was the preparation of meals, which obviously is not itself navigational work. Thus, the court's statement that a cook is a seaman "because he usually cooks for seamen" simply recognizes that a cook's seaman status

necessarily derives from the status of those for whom the meals are prepared. The court was therefore correct in concluding that Blue Water's cooks are not exempt seamen unless they spent a predominant amount of their time preparing food for seamen. See, *e.g.*, *Worthington* v. *Icicle Seafoods, Inc.*, 796 F.2d 337, 338 (9th Cir. 1986) (remand to determine if 20 percent of work was non-seaman's work).

Petitioners assert (Pet. 15-16), however, that Blue Water's cook-employees are exempt seamen because they prepare meals for individuals being transported aboard a seagoing vessel.[5] If accepted, that contention would result in the anomaly that cooks could be deemed seamen, exempt from the overtime provisions of the Act, even though they prepared meals only for oil-well service workers and performed no other duties which might otherwise be viewed as seamen's work.[6] Nor is petitioners'

[5] In essence, petitioners seek to import the definition of "seaman" established under the Jones Act, 46 U.S.C. 688, and Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, into the FLSA. See *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807, 817 (1991) (employee is a "seaman" under the former statutes if he contributes to the functioning or mission of the vessel, but need not "aid in navigation or contribute to the transportation of the vessel"). As the court here recognized (Pet. App. 9a), however, the Fifth Circuit has expressly held that the term "seaman" under the Jones Act and FLSA "has different, independent meanings." *Petroleum Treaters*, 876 F.2d at 520-522, 524 (offshore oil maintenance service workers who are clearly Jones Act "seamen" are not exempt "seamen" under the FLSA). Other courts have also recognized that the definition of "seaman" under the FLSA is distinct from its meaning under other statutes. See, *e.g.*, *Walling* v. *Bay State Dredging & Contracting Co.*, 149 F.2d 346, 349 (1st Cir.), cert. denied, 326 U.S. 760 (1945).

[6] Indeed, the seaman exemption was enacted, in part, because of the difficulty in regulating the hours of those aboard ship who must respond to unpredictable conditions at sea. See, *e.g.*, *Anderson* v. *Manhattan Lighterage Corp.*, 148 F.2d 971, 973 (2d Cir.),

argument aided by their reliance (Pet. 17-18) on *Louviere* v. *Standard Dredging Corp.*, 239 F.2d 164 (5th Cir. 1956). In that case, the court held that a deckhand on a tug boat, whose work was indisputably "seaman" in nature, did not lose his seaman status simply because the tugboat towed a dredge carrying non-seamen. Like the court here, the *Louviere* court looked to whether the deckhand's own duties were primarily maritime. *Id.* at 165 (deck hand's "sole employment" was "work entirely of the kind that deckhands do"). Unlike the court below, the *Louviere* court had no need to consider the status of those benefiting from the deck hand's services because the deckhand's work was, in the first instance, maritime in nature. Even if there were some tension between *Louviere* and the decision below, moreover, review would not be warranted to correct that intra-circuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).[7]

cert. denied, 326 U.S. 722 (1945); *Helena Glendale Ferry Co.* v. *Walling*, 132 F.2d 616, 619 (8th Cir. 1942). That underlying purpose would obviously not be served by extending the exemption to petitioners' cook-employees.

[7] Petitioners' reliance (Pet. 17-18) on *Donovan* v. *Nekton, Inc.*, 703 F.2d 1148 (9th Cir. 1983), and *Marshall* v. *Woods Hole Oceanographic Inst.*, 458 F. Supp. 769 (D. Mass. 1978), is similarly misplaced. Although it appears that overtime compensation for seagoing cooks was not sought in those cases, the courts' opinions are silent as to the pay status and duties of the cooks. Thus, no inferences of any relevance to this case can be drawn from those decisions.

Similarly, petitioners' prediction (Pet. 14) that the decision below will lead to economic ruin for passenger-carrying vessels is wholly unsubstantiated. The record contains no evidence of labor practices in the cruise industry, and in any event this case does not involve the question whether cooks who provide services for cruise-vessel passengers are seamen for purposes of the FLSA.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MARSHALL J. BREGER
Solicitor General

ALLEN H. FELDMAN
Associate Solicitor

JUDITH D. HEIMLICH
Attorney
Department of Labor

SEPTEMBER 1992